

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE WAUKEEN Q. MCCOY

No. C 16-04079 WHA
Br. No. 14-30381 HLB

**ORDER AFFIRMING DECISION
OF BANKRUPTCY COURT RE
SPECIAL DEAL FOR DEBTOR
WAUKEEN MCCOY**

INTRODUCTION

This is an appeal from the bankruptcy court's orders (1) approving a sale of the estate's interest in real property, and (2) granting in part and denying in part debtor's motion for reconsideration. The bankruptcy court's decision as to both orders is **AFFIRMED**.

STATEMENT

In March 2014, debtor and appellant Waukeen McCoy filed for Chapter 13 bankruptcy. At the time, he resided at and held in joint tenancy real property located on Clayton Street in San Francisco. In June 2014, McCoy successfully moved to convert his bankruptcy case to Chapter 11. In April 2015, the Trustee successfully moved to convert the case to Chapter 7.

1. TRUSTEE'S MOTION TO SELL.

In March 2016 and after "nearly six month[s] of marketing efforts," the Trustee moved to sell the subject property — with the co-owner's consent — to prospective purchasers for \$2.2 million, free and clear of all liens and subject to overbid. Any overbid had to be at least \$2.225

1 million. The Trustee asked Bankruptcy Judge Hannah Blumenstiel to authorize use of the sale
2 proceeds to, among other things, pay a five percent commission, or \$110,000, to be divided
3 equally between Mark Benson, the Trustee's broker, and Gavin Stuart, the prospective
4 purchasers' broker. The Trustee also asked Judge Blumenstiel to require McCoy to vacate the
5 premises by the time the sale closed.

6 McCoy opposed the Trustee's motion to sell. The Trustee's reply, however, revealed
7 that McCoy had actually participated in the overbid procedure, with some modifications.
8 Specifically, McCoy had overbid to purchase only the estate's 50 percent interest in the subject
9 property for \$210,500, "an amount calculated to provide the estate with the equivalent cash
10 proceeds . . . that would have been generated if the Property was sold for the minimum overbid
11 price of \$2.25M [*sic*]," and "*subject to* all liens and encumbrances (rather than free and clear of
12 all liens)" (Dkt. No. 3-35 at 2). There had been no other overbids, and the prospective
13 purchasers declined to participate in an auction to bid against McCoy's overbid. The Trustee
14 therefore intended to seek Judge Blumenstiel's approval to instead sell the estate's 50 percent
15 interest in the subject property to McCoy, as McCoy wished, with the prospective purchasers as
16 backup buyers in case McCoy failed to perform.¹

17 Prior to the hearing on his overbid, McCoy had signed a draft purchase and sale
18 agreement that provided for a purchase price of "no less than \$210,500" (Dkt. No. 3-35 at 33).
19 That agreement remained in draft form pending the anticipated auction on McCoy's overbid,
20 which might have raised the final purchase price (*see* Dkt. No. 3-50 at 21, 24). As stated,
21 however, no auction took place because no one bid against McCoy's overbid.

22 The prospective purchasers objected to McCoy's overbid. They protested that McCoy
23 had not satisfied the overbid requirements because he did not offer at least \$2.225 million to
24 purchase the *entire* subject property free and clear of liens. Moreover, they criticized the plan
25 to accept McCoy's overbid because it would not pay the creditors whose liens were tied up in
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27 ¹ The Trustee's reply also noted that "[t]he \$2.2M purchase price [was] an accurate reflection of the
28 fair market value of the Property as no other buyer [had] come forward to present an overbid," and "the
Trustee's broker marketed the Property for over six months before [the prospective purchasers] presented their
offer of \$2.2M" (Dkt. No. 3-35 at 5-6).

1 the subject property. They further criticized McCoy's overbid on the basis that, while Benson
2 (the Trustee's broker) would still be paid for his efforts no matter what, Stuart (the prospective
3 purchasers' broker) would receive no compensation for his work if Judge Blumenstiel approved
4 McCoy's overbid. Finally, the prospective purchasers refused to act as backup buyers in case
5 McCoy's overbid fell through.

6 At the hearing on the Trustee's motion to sell, Judge Blumenstiel asked McCoy if he
7 was "prepared to proceed with the transaction on the terms that [were] recently proposed."
8 McCoy confirmed that he was (Dkt. No. 3-42 at 3:3-4:6). Judge Blumenstiel therefore
9 indicated she would grant the Trustee's motion and approve "the overbid sale of the estate's
10 interests to the debtor on the terms recently proposed by the trustee" (*id.* at 4:13-4:16). McCoy
11 assured Judge Blumenstiel that he would be able to hold up his end of the deal but added, "I
12 don't think I should pay for the broker's fee because there's no sale" (*id.* at 5:17-5:20). The
13 Trustee (through her attorney) then confirmed her intent "to pay Mr. Benson, who is the
14 trustee's broker, without whose efforts this overbid would never have taken place." Judge
15 Blumenstiel replied, "I have no problem with that either" (*id.* at 6:9-6:12).

16 A written order issued on April 25, 2016, overruling the prospective purchasers'
17 objection and approving the Trustee's sale of the estate's 50 percent interest in the subject
18 property to McCoy for \$210,500, subject to all liens and encumbrances. The order observed
19 that McCoy's overbid was "the highest and best offer presented and resulted in more
20 consideration to the estate than [the prospective purchasers'] offer" (Dkt. No. 3-38 at 2). The
21 order also authorized the Trustee to pay Benson \$55,000 for his broker's commission.

22 **2. MCCOY'S MOTION FOR RECONSIDERATION.**

23 McCoy paid the Trustee (*see* Dkt. No. 3-54 at 4:8-4:14) but also moved for
24 reconsideration of the order approving the sale, claiming he had actually agreed to purchase the
25 estate's 50 percent interest in the subject property for only \$175,000. He argued that Judge
26 Blumenstiel had improperly conflated the purchase price with Benson's broker's commission of
27 \$55,000, which McCoy contended he should not have to pay because it would be exorbitant
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1 given his accepted overbid. Significantly, McCoy did not seek to undo the sale, but rather
2 demanded that the Trustee return \$55,000 of the purchase price to him.²

3 McCoy apparently pulled the figure of \$175,000 from a letter he had written to the
4 Trustee on April 2, 2016, wherein he offered that sum in exchange for the Trustee abandoning
5 the subject property (Dkt. No. 3-49 at 12–14). The Trustee had rejected that offer in a reply
6 letter on April 6, 2016, stating (*id.* at 16 (footnote omitted)):

7 The Trustee cannot seek to abandon the Clayton Property in light
8 of the pending sale motion but is willing to allow you to participate
9 in the overbid procedures outlined in the sale motion, with some
10 modifications that would allow you to bid only on the estate's 50%
11 interest in the property, subject to all liens.

12 As you know, the minimum overbid for the property is \$2.25 [*sic*]
13 million. A sale at that price would generate net proceeds to the
14 estate in the approximate amount of \$155,500 after payment of the
15 brokers' commission due to the Trustee's real estate broker and the
16 buyer's broker. Without the Trustee's broker's efforts, we would
17 not have been able to procure a buyer for the Clayton Property and
18 for that reason, the amount of the overbid must also include the
19 \$55,000 sales commission that would otherwise be payable to the
20 Trustee's broker. Therefore, the amount of your minimum overbid
21 to acquire the estate's 50% interest in the property, subject to all
22 liens, is approximately \$210,500.

23 On April 11, 2016, and as part of a series of email exchanges hashing out details of the
24 modified overbid procedure, McCoy emailed the Trustee (Dkt. No. 3-50 at 13):

25 Also, in your most recent correspondence you indicated that the
26 broker's fee would be included in the purchase of my 50% interest
27 even though no "sale" would occur if I am the highest bidder. Can
28 you explain why this condition has been added to my purchasing
50% when the house will not be sold free and clear of the liens?
Although Mr. Benson secured the buyers in contract, they may not
end of [*sic*] purchasing the property.

The next day, the Trustee replied, "Mr. Benson will be paid a commission from the disposition
of the property because the overbid process would not have been made possible without his
efforts" (*id.* at 15). McCoy did not further argue the point until the hearing on the Trustee's

² The calculations in McCoy's motion are clearly erroneous. At one point, for example, he claimed he bought the estate's 50 percent interest in the subject property for \$175,000, Benson's commission was \$55,000, and Judge Blumenstiel approved a purchase price of \$210,000 (Dkt. No. 3-39 at 2). Later on the same page, he correctly identified the purchase price as \$210,500. His theory seemed to be that Judge Blumenstiel erroneously added \$55,000 to \$175,000 to arrive at either \$210,000 or \$210,500 (*see id.* at 2–3; Dkt. No. 3-43 at 4), but \$175,000 plus \$55,000 actually equals \$230,000.

1 motion to sell, when he commented, “I don’t think I should pay for the broker’s fee because
2 there’s no sale” (Dkt. No. 3-42 at 5:17–5:20). Nor did McCoy otherwise indicate that his
3 continued participation in the overbid procedure depended in any way on the Trustee ultimately
4 reducing or eliminating Benson’s expected commission.

5 The Trustee opposed McCoy’s motion for reconsideration, unequivocally stating she
6 had never agreed to sell the estate’s 50 percent interest in the subject property to McCoy for less
7 than \$210,500 (Dkt. No. 3-49 at 2). The Trustee also pointed out the inconsistencies in
8 McCoy’s own calculations of the purported true purchase price.

9 In his reply in support of his motion for reconsideration, McCoy shifted ground,
10 changing his version of the true purchase price from \$175,000 to \$155,500. He claimed that
11 when the Trustee “wrote that it was her belief that the Estate would obtain a benefit in the
12 amount of \$155,500 after payment of the brokers’ commission,” he “understood that [\$155,500]
13 was the minimum bid amount” required to purchase the estate’s 50 percent interest in the
14 subject property (Dkt. No. 3-50 at 2).

15 At the hearing on McCoy’s motion for reconsideration, Judge Blumenstiel — referring
16 to the draft purchase and sale agreement McCoy had signed — reminded McCoy that he had
17 agreed to purchase the estate’s 50 percent interest in the subject property for “no less than
18 \$210,500” and asked him to explain how he could get around that agreement (Dkt. No. 3-53 at
19 7:11–7:25). McCoy responded that the draft “was not the final agreement,” and that he “had to
20 sign [the draft] in order to participate in the auction” (*id.* at 8:1–8:4). He did not dispute,
21 however, that the draft purchase and sale agreement accurately represented the actual approved
22 terms of sale. Judge Blumenstiel then asked, “where does this contract say that part of that
23 money is intended as a broker fee?” McCoy admitted the contract contained no such provision
24 but claimed, again shifting ground, that he had paid the purchase price of \$210,500 “under
25 protest as to the broker’s fee” in order to save his house (*id.* at 9:3–10:11).

26 Judge Blumenstiel indicated that McCoy would have to “live with” the promise he
27 made, but that Benson would likewise have to live with his own commission contract to receive
28 only “five percent of the *selling price*.” Judge Blumenstiel also commented, “it’s not like this

1 difference [in commission] would be going back to [McCoy]. It would be going to pay
2 creditors” (*id.* at 16:3–16:22). She concluded (*id.* at 19:14–20:20):

3 [The sale] contract clearly sets forth the purchase price as
4 \$210,500 and doesn’t differentiate between the amount that was
5 paid for the real property and an amount . . . earmarked for Mr.
6 Benson. So I find and conclude that the Debtor agreed to pay
7 \$210,500, and so I’m going to deny the motion to the extent it
8 requests . . . a finding that what Mr. McCoy paid for the property
9 was \$155,000. It’s simply not supported by the evidentiary record.

10 The calculation of the commission that the estate ultimately
11 intended or may have already paid to Mr. Benson is another thing
12 entirely. The contract with Mr. Benson indicates that he agreed to
13 accept a five percent commission Mr. Benson was entitled to
14 a five percent commission calculated on the selling price, which
15 was \$210,500. By my calculation, that means he was entitled to a
16 commission of \$10,525

17 The difference remains in the estate because as I originally
18 concluded, the price that Mr. McCoy agreed to pay for this
19 property was \$210,500.

20 A written order issued on July 8, 2016, granting in part the motion for reconsideration
21 on the basis that, because the purchase price ended up at \$210,500, Benson’s commission
22 should have been five percent of \$210,500, or \$10,525. The order denied the motion for
23 reconsideration in all other respects.

24 ANALYSIS

25 The gravamen of McCoy’s position on appeal is that the bankruptcy court should have
26 ordered the Trustee to refund McCoy \$44,475 — the difference between Benson’s expected
27 commission of \$55,000 and his approved commission of \$10,525 — because McCoy
28 supposedly paid the purchase price of \$210,500 “under protest” (*see* Dkt. Nos. 1-3 at 1–3, 3-55
at 1–4, 7 at 3).

As a preliminary matter, the Trustee urges dismissal of this appeal because McCoy, a
trial attorney, failed — twice — to timely file his opening brief. McCoy’s opening brief was
originally due on October 27, 2016. On October 31, McCoy belatedly moved to continue that
deadline. A prior order granted the motion and continued the due date for the opening brief to
November 14. McCoy missed that deadline too and filed his opening brief on November 17.
McCoy’s reply brief defends his untimeliness by citing California Rule of Court 8.220 for the

1 proposition that, once he missed the deadline for his opening brief, the court clerk had to notify
2 him in writing that he had 15 days to file it (Dkt. No. 9 at 6–7). This is a total non-starter
3 because California Rules of Court have nothing to do with federal practice. As a trial attorney,
4 McCoy surely knows better. The Court agrees that the appeal should be dismissed on this
5 ground but will reach the merits anyway.

6 The bankruptcy court’s rulings on the Trustee’s motion to sell the subject property and
7 McCoy’s motion for reconsideration are both reviewed for abuse of discretion. *In re Clark*, 266
8 B.R. 163, 168 (B.A.P. 9th Cir. 2001); *In re Hansen*, 368 B.R. 868, 875 (B.A.P. 9th Cir. 2007)
9 (citing *In re Weiner*, 161 F.3d 1216, 1217 (9th Cir. 1998)). McCoy has utterly failed to show
10 the bankruptcy court abused its discretion.

11 *First*, McCoy cites case law for the proposition that bankruptcy courts can set aside
12 sales on equitable grounds, and argues that he “was in an unfair bargaining position because he
13 would not be able to participate in the bidding process unless he complied with the [Trustee’s]
14 unfair demand” (Dkt. No. 7 at 6–7). To reiterate, McCoy does *not* seek to set aside the sale. He
15 has no intent to return his 50 percent interest in the subject property acquired through the sale
16 — he rather wants to keep it for a reduced price.

17 Neither McCoy nor the record provides any support for his repeated characterization of
18 Benson’s commission — calculated based on the original \$2.2 million deal with the prospective
19 purchasers derailed by McCoy’s overbid — as “exorbitant.” McCoy’s own requested relief on
20 appeal — not a complete excision of Benson’s commission from the purchase price but a mere
21 refund for the difference between Benson’s expected and approved commissions — belies any
22 suggestion that inclusion of the commission in the purchase price is somehow inappropriate.
23 Finally, McCoy’s complaint that not being able to participate in bidding without paying the
24 asking price constitutes an “unfair bargaining position” is baffling. McCoy seems to believe he
25 was somehow *entitled* to bid on the subject property on his own terms instead of the Trustee’s
26 (*see id.* at 7 (claiming the Trustee took “unfair advantage” of McCoy by “refusing to allow
27 [him] to bid on his own property without inclusion of the excessive broker’s fees”)). Yet
28 another non-starter.

1 *Second*, and to support his contention that the sale was unfair, McCoy points out that
2 “the Attorney for [the prospective purchasers] reasoned that the overbid procedures [for
3 McCoy] did not comply with the [Trustee’s] noticed procedures for the sale” (*ibid.*). Counsel
4 for the prospective purchasers made that argument in the context of urging the bankruptcy court
5 to reject McCoy’s overbid because it *had not complied with the noticed overbid procedure*.
6 McCoy cherry-picks and distorts the prospective purchasers’ argument to suit his purposes but
7 ignores the larger fact that, had they prevailed, the subject property would have sold to them
8 instead of to him.

9 *Third*, McCoy claims that “[t]here was no contract for the purchase of the [subject]
10 property,” and that the written contract he signed “was for Bidding Purposes Only” (*id.* at 9).
11 The bankruptcy court found to the contrary, and its findings of fact are reviewed for clear error.
12 *In re Int’l Fibercom, Inc.*, 503 F.3d 933, 940 (9th Cir. 2007). No such error occurred here.

13 Once the prospective purchasers withdrew as the only other potential buyers, the Trustee
14 clearly communicated to McCoy that the “draft” agreement he had signed would become final
15 upon the bankruptcy court’s approval. The record contains *no* evidence of any renegotiation
16 thereof, much less evidence of any other “agreement” reached between McCoy and the Trustee.
17 The Trustee flatly denies any other agreement existed. McCoy never memorialized any
18 different “agreement.” He must resort to bald assertion for his only support but, even now,
19 cannot consistently describe the supposedly different “agreement.” For example, he requests
20 only a refund of the difference between Benson’s expected and approved commissions, even
21 though he claims the “real” sale agreement excluded the broker’s commission altogether. And
22 in his opening brief, he reverts to his original position that he should pay only \$175,000 — an
23 amount he himself had previously admitted to be erroneous. It would be redundant and
24 wasteful to retrace the many inconsistencies in McCoy’s calculations of what the purchase price
25 was “supposed” to be. The bottom line is that his inability to produce a consistent story further
26 belies his assertion that a different sale agreement existed.

27 In his reply brief, McCoy claims the bankruptcy court actually “modif[ied] the Purchase
28 Agreement to reflect that the broker’s fee of \$55,000.000 was to be reduced to \$10,525.00”

(Dkt. No. 9 at 6). This is false. The bankruptcy court expressly found that McCoy had agreed to pay \$210,500, and that the correct amount of commission under Benson's contract was "another thing entirely" (Dkt. No. 3-53 at 19:23–19:25). And — in yet another perplexing arithmetic error — McCoy seems to forget that if a five percent commission for Benson amounted to \$10,525, then the predicate purchase price *must have been* \$210,500. In short, McCoy's assertion that the bankruptcy court crafted a new agreement that superseded his agreement with the Trustee is contradicted by both the record and third-grade math.

Significantly, McCoy never made any serious effort to renegotiate his deal with the Trustee. He never made his overbid contingent on any specific terms, including omission of broker's fees. Rather — despite complaining about various decisions of the Trustee throughout the sale process and briefly griping on two occasions about Benson's commission — McCoy unambiguously agreed to pay the Trustee's price to retain his home. That price included a cash payment of \$210,500 with no delineation for Benson's commission, whether as-expected or subject to the bankruptcy court's approval. The purchase price was the purchase price, McCoy agreed to pay it, and his agreement did not hinge on any condition — including the possibility that the bankruptcy court might disapprove of or reduce Benson's commission. Only after affirming and re-affirming his agreement to the deal, obtaining the Trustee's consent and the bankruptcy court's approval, and acquiring the estate's 50 percent interest in the subject property did McCoy about-face to complain that he paid too much. This order refuses to bless McCoy's Soviet-style negotiation — "what's mine is mine and what's yours is negotiable."

The Trustee and Judge Blumenstiel showed McCoy more leniency than most trustees or bankruptcy judges (or district judges) would have — far more. Allowing McCoy to retain his home required both specially modifying the overbid procedure for him and passing up a chance to sell the subject property free and clear of liens to prospective purchasers prepared to pay \$2.2 million for it. Having reaped the benefits of his special deal and chased off the prospective purchasers, McCoy now wants to renegotiate the terms of that special deal. The bottom line is that McCoy *agreed* to those terms and the time has come for him to honor his word. Whether

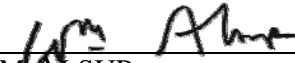
1 or not he liked the conditions imposed by the Trustee, the bottom line is that he *accepted* those
2 conditions. Judge Blumenstiel was within her discretion in insisting that McCoy keep his word.

3 **CONCLUSION**

4 The bankruptcy court's decision is **AFFIRMED** as to both its order approving the
5 Trustee's motion to sell the estate's interest in the subject property and its order denying in part
6 McCoy's motion for reconsideration. Judgment shall follow.

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8 **IT IS SO ORDERED.**

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10 Dated: March 30, 2017.

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13 WILLIAM ALSUP
14 UNITED STATES DISTRICT JUDGE
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